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No. 02-570

IN THE
Supreme Court of the United States

SUE WALSTON,
Petitioner,

v.

DAVID L. LOCKHART and REBECCA G. LOCKHART,
Respondents.

On Petition for a Writ of Certiorari to the
Court of Appeals for the Tenth District of Texas,
at Waco, Texas

MOTION AND BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF THE PETITION

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November 2002

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MOTION OF PUBLIC CITIZEN FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION

Movant Public Citizen hereby seeks leave to file a brief amicus curiae in support of this pro se petition. The petition raises the question whether contributions to state judicial election campaigns can create an unconstitutional appearance of partiality, requiring recusal of the judge or judges who received the donations.*

Plaintiff Public Citizen, Inc., a nonprofit consumer advocacy organization incorporated and headquartered in the District of Columbia, has approximately 135,000 members, of whom approximately 3,200 live in Texas. Public Citizen has maintained an office in Austin, Texas, since 1984. Public Citizen is active before the United States Congress, the Texas legislature, and courts throughout the country on a wide variety of issues, including access to the civil justice system, campaign finance reform, and protection of the right to due process. Public Citizen and its Texas members have been and will continue to be parties to and appear as amicus curiae in litigation in Texas state courts. As a corporation, Public Citizen is forbidden by Texas law from contributing to political campaigns. Even if it were not prohibited from making contributions, it could not afford to make substantial contributions and, in any event, would not do so because it opposes the "purchasing of justice" in this manner.

In 2000, Public Citizen was one of the plaintiffs in a section 1983 case entitled *Public Citizen v. Bomer*. *Bomer* was

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* A letter stating petitioner's written consent has been lodged with the Clerk. Dwayne Danner, counsel for respondent, does not consent to the filing of a brief amicus curiae.

brought in the United States District Court for the Northern District of Texas by five Texas lawyers and two non-profit organizations, on behalf of themselves, their clients, and their members who had litigated and would litigate in Texas courts. Some of the plaintiffs contributed to judicial elections because they believed that not contributing would threaten their clients' access to impartial judges. Others did not contribute either because they could not afford to make substantial contributions, they were opposed to the Texas system for financing judicial elections, and/or, in the case of the organizational plaintiffs, they were prohibited by law from contributing. In addition, the clients of the lawyer plaintiffs were generally appearing in court for the first time and were often financially unable to contribute. The plaintiffs all believed that the current system of financing judicial elections creates the appearance, if not the reality, of partiality and impropriety of Texas state judges, to the detriment of the legal profession, the lawyer-plaintiffs' law practices, and their clients' and/or members' interests. The complaint in *Bomer* asked for a declaration that the current system, including the refusal of Texas courts to consider campaign contributions from a party or its lawyer to a judge on the case as a basis for recusal, is unconstitutional, leaving to the State of Texas the decision of what constitutional system should be adopted in its place. In September 2000, the district court granted defendant's motion to dismiss for failure to state a claim. In November 2001, a panel of the Fifth Circuit affirmed the dismissal of the case on the ground that the plaintiffs lacked standing. 274 F.3d 212 (5th Cir. 2001).

We believe that the Court will benefit from an amicus brief at the certiorari stage because the petitioner is pro se before this Court and is not herself a lawyer. We also believe that our brief will sharpen the issues set out in the petition and provide a more focused perspective on the due process issue

presented by state systems that allow parties and lawyers to contribute to the campaigns of the judges who preside over their cases. We therefore ask that Public Citizen be granted leave to file the accompanying brief amicus curiae in support of the petition.

Respectfully submitted,

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QUESTION PRESENTED

Whether a state, consistent with due process, may adopt a rule that campaign contributions made by parties or lawyers to a judge sitting on their case can never form the basis for the judge's recusal—no matter how large the contributions, when they were made, or whether the judge personally solicited them.

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INTRODUCTION

Under the Texas system of financing judicial elections, lawyers who regularly appear in court and parties who are frequent litigants routinely contribute thousands of dollars to the campaigns of judges who then preside over their cases. Those contributions can be and often are made while a case is pending before the judge. In addition, Texas law expressly authorizes judges personally to solicit campaign funds from parties and lawyers. Yet under Texas law, a judge is never subject to a motion for recusal based on campaign contributions that were made to the judge by a party and/or its attorneys. The petition raises the question whether, under the Due Process Clause, Texas courts may ignore the blatant appearance of impropriety in such cases, or whether they must, at the very least, inquire into the circumstances and amounts at issue when one party questions the opposing party's and/or its lawyers' contributions to a judge sitting on the case.

INTEREST OF AMICUS CURIAE

The interest of amicus Public Citizen is set out in the accompanying motion for leave to file this brief.[1]

STATEMENT OF THE CASE

Under the Texas Constitution, all state judges are elected. The nine supreme court justices and the 79 courts of appeals justices serve six-year terms. The approximately 400 judges of the district courts and the 447 judges of the county-

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[1]Pursuant to Rule 37.6 of this Court, amicus states that no party had any role in writing this brief and that no one other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

level courts (constitutional county courts, county courts at law, and probate courts) serve four-year terms. Tex. Const. art. 5, §§ 2, 6, 7, 15 (terms of office); www.courts.state.tx.us/public info/AR98 (number of courts).

Any "person" other than labor unions and most corporations may make financial contributions to the election campaigns of judges in Texas. Tex. Elec. Code Ann. § 253.091, § 253.094. Corporate shareholders, officers, and employees and union members are free to give on their own behalves. Prior to June 16, 1995, when what the Texas Legislature called the "Judicial Campaign Fairness Act" became effective, *see id.* § 253.151 *et seq.*, the amount a judicial candidate could accept from a contributor—including a lawyer or other person with a direct interest in a matter pending before a sitting judge running for re-election—was unlimited. Since June 1995, a judicial candidate may not accept more than $5,000 from any one person per election for a campaign for election to the supreme court, the court of criminal appeals, or a judicial office in a judicial district where the population exceeds one million. *Id.* § 253.155; *see also* http://txsos-7.sos.state.tx.us/elections/laws/populations.shtml (8 of 14 court of appeals districts have populations exceeding one million).[2] If the judicial district's population is between 250,000 and one million, the candidate may not accept more than $2,500 from one person per election. Tex. Elec. Code Ann. § 253.155. If the judicial district's population is less then 250,000, the limit is $1,000 from one person per election. *Id.*

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[2]To put that amount in perspective, it is 2½ times the amount that any individual may contribute to a candidate for president of the United States, and five times the maximum amount permitted prior to November 6, 2002. *See* 2 U.S.C. § 441a(1)(A).

The contribution limits are calculated separately for each election, not for each election cycle. Thus, a contributor may give $5,000 to a candidate for a seat on the supreme court for the primary election, $5,000 for the general election, and $5,000 for any runoff election. Tex. Ethics Comm'n Advisory Op. No. 302 (1996). The law places no limit on the total amount of contributions that an individual may make to all judicial candidates and PACs combined.

Texas law establishes separate limits for contributions from law firms and their members. After the combined contributions of the firm and its members to a single candidate for a single election reach six times the limit imposed on individuals—for example, $30,000 in the case of a statewide judicial office—a candidate may not accept contributions of more than $50 from other members of the firm for that election. 15 Tex. Elec. Code Ann. § 253.157.

Limitations on PAC contributions are calculated differently than are limitations on contributions by individuals. The Act sets voluntary expenditure limits for candidates for each judgeship, *id.* § 253.164, § 253.168, and a candidate may accept from PACs a combined total of up to 15 percent of the applicable voluntary expenditure limit. That combined total may come from one PAC or from many. For example, in the case of an election for a statewide judicial office, for which the voluntary expenditure limit is $2,000,000, one or more PACs may contribute a combined total of up to $300,000 per candidate. *Id.* § 253.160.

If a candidate does not abide by the applicable voluntary expenditure limit, the contribution limits are suspended for that candidate's opponents. *Id.* § 253.165. Thus, for example, if a challenger chooses not to abide by the voluntary limit, the

incumbent candidate may accept unlimited contributions from any person or law firm, even one with a case pending in his or her court.

Contributions by litigants or lawyers to the judicial candidacy of judges before whom they have matters pending are not subject to any additional prohibition or limitation. In fact, as noted in a 1999 report prepared for the Supreme Court of Texas, "nothing in the Act would bar a judge who has accepted an excessive, illegal contribution to preside over a case involving the contributor." Supreme Court of Texas, Judicial Campaign Finance Study Committee, Report and Recommendations, at 18 (Feb. 23, 1999).

Judicial candidates may begin campaign solicitations approximately seven months (210 days) before the January 2 deadline for filing an application to be placed on the ballot and for approximately four months (120 days) after the last election (primary, runoff, or general) in which the candidate has an opponent. 15 Tex. Elec. Code Ann. § 253.153(a); *id.* § 172.023(a). Thus, a sitting judge may solicit contributions for 21 months (seven months before filing deadline, ten months from deadline through general election, four months after general election) of each four- or six-year term.

Canon 2 of the Texas Code of Judicial Conduct requires each judge to "avoid[] impropriety and the appearance of impropriety in all of the judge's activities." Notwithstanding this general admonition, the Texas Code omits Canon 5(C)(2) of the ABA Model Code of Judicial Conduct, which prohibits candidates from personally soliciting or accepting campaign funds and requires that a campaign committee perform those tasks. As a result, Texas is one of only four states in which judges may personally solicit campaign contributions. ABA,

Report and Recommendations of the Task Force on Lawyers' Political Contributions, Part Two at 40-41 n.73 (July 1998). In fact, Canon 4D(1) of the Texas Code of Judicial Conduct expressly permits judges and candidates for judicial office personally to solicit funds for their campaigns for judicial office, with no prohibition or limitation on soliciting from people who have current business before them or who are likely to come before them if they become judges.

Not surprisingly, individuals and groups with substantial interests in litigation, including lawyers, businesses, and groups with a significant number of cases pending before the courts, regularly contribute large amounts of money to judges and candidates for judicial office. For example, the parties and lawyers involved in the nine cases heard by the Texas Supreme Court in March 2002 had contributed $972,133 to the nine justices. The parties and lawyers involved in the nine cases heard in April 2002 had contributed $810,796 to the justices. Texans For Public Justice, Dollar Docket (April 17, 2002; May 22, 2002) (available www.tpj.org). Petitioner informs us that, according to the contribution reports on file with the Texas Ethics Commission, the two court of appeals justices who ruled against her accepted contributions from lawyers representing her opponents in amounts totaling from $300 to $2,550 in 1991, 1996, and 2000.[3]

Moreover, lawyers and law firms accounted for 50 percent or more of the contributions received by each of the four supreme court justices who ran in 1998. Texans For Public

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[3]Copies of Justice Vance's 2000 reports are available at www.ethics.state.tx.us/whatsnew/srchinfo. His earlier reports and Justice Davis's reports are available from the offices of the Texas Ethics Commission in Austin. *See* Pet. at 6 n.2, 7 n.3, & 8 n.4.

Justice, Checks & Imbalances: How the Texas Supreme Court Raised $11 Million, Part VI at I-2 (April 11, 2000) (available www.tpj.org). Business and PAC contributions accounted for another 15 to 17 percent of the money raised by each candidate. *Id.* Three of the justices faced no serious opposition in the primary, and each raised many times the amount raised by his or her general election opponent. *Id.* (Part IV at 2). One justice raised 82 percent of a total $1,153,747 from lawyers, businesses, and PACs and raised 68 times as much money as his general election opponent. *Id.*

As these figures suggest, the huge amounts of money collected by judicial candidates cannot be dismissed as necessary to pay for the costs of campaigning. In fact, the absence of a strong opponent does not seem to correlate with decreased fundraising. For instance, in the 1997-98 election cycle, three incumbent supreme court justices ran in primaries that were uncontested or practically uncontested (one challenger raised $134). These incumbents raised 7.6 to 68 times the amounts raised by their general election opponents, Checks & Imbalances, *supra*, Part IV at 2, and each won easily. *See* http:/204.65.104.19/elchist.exe (results posted by Secretary of State). In the 1995-96 election cycle, the four incumbent justices running for re-election each ran in uncontested primaries and raised between 14 and 1,425 times what their main general election opponents had to spend. Texans for Public Justice, Payola Justice: How Texas Supreme Court Justices Raise Money From Court Litigants at 25 (Feb. 1998) (available at www.tpj.org).

Because lawyers and political action committees whose constituents regularly appear before the courts are major contributors to Texas judicial campaigns, individuals such as Petitioner are often forced to litigate before judges who have

accepted contributions from the opposing side. Although Texas Rule of Civil Procedure 18b and Texas Rule of Appellate Procedure 15a require recusal when a judge's "impartiality might reasonably be questioned," under Texas case law, a judge need not disqualify him or herself from a case where one party or its lawyer has been a contributor to the judge's election campaign, no matter how recent or large that person's contribution, alone or in combination with the contributions of others with similar interests in the outcome of the case. Indeed, motions to recuse a judge based on campaign contributions of an opposing party or counsel to the campaign of that judge have been uniformly unsuccessful. *See Apex Towing Co. v. Tolin*, 997 S.W.2d 903, 907 (Tex. 1999) (no recusal where judge received "substantial political donations from counsel and from one of the parties"); *Williams v. Viswanathan*, 65 S.W.3d 685, 689 (Tex. App. 2001) (argument that "bias is shown because appellants' opposing counsel made contributions to [judge's] campaign . . .has been rejected by the courts of this state"); *Aguilar v. Anderson*, 855 S.W.2d 799, 802 (Tex. App. 1993) (no recusal where judge solicited and lawyer contributed while case pending); *J-IV Invs. v. David Lynn Mach., Inc.*, 784 S.W.2d 106 (Tex. App. 1990) (no recusal where $500 contributed to judge after verdict but before decision on motion jnov); *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 842 (Tex. App. 1987) (no recusal although plaintiff's counsel contributed $10,000 to trial judge soon after filing lawsuit); *River Road Neighborhood Ass'n v. South Texas Sports, Inc.*, 673 S.W.2d 952 (Tex. App. 1984) (no recusal although 21.7% of total campaign contributions of one justice came from appellee's lawyer; 17.1% of contributions to another justice came from appellee).

The Texas system for financing judicial elections undermines Texans' respect for their judicial system. A 1999

survey conducted by the Texas Office of Court Administration and the State Bar of Texas found that 83 percent of the respondents believed that campaign contributions have a "very significant" or "somewhat significant" influence on judges' decisions. Judicial Campaign Finance Study, *supra*, at 4; *see also* Column, *Texas justice for sale? Judge it yourself*, Houston Chronicle, Sept. 13, 1992, Outlook at 2 ("a fair system of justice demands not only a judiciary that is independent but also a judiciary that promotes public confidence in its independence and integrity, and both those requirements are jeopardized by a virtually unrestricted campaign finance system.").[4]

Many Texas judges agree. A study prepared by the Texas Supreme Court, the Texas State Bar, and the Texas office of Court Administration in May 1999 found that 48 percent of judges think contributions have a significant influence on decisionmaking; only 14 percent think that they have no influence. *See* Supreme Court of Texas, *et al.*, The Courts and The Legal Profession in Texas - The Insider's Perspective at 19 (May 1999) (available at http:courts.state.tx.us/publicinfo/reports.asp). Chief Justice Thomas Phillips and former-Justice, now-Attorney General John Cornyn have testified that the "appearance of impropriety" caused by multimillion dollar judicial campaigns is "a cancer" on the state judiciary. *Judges offer opposing views on campaign-donation limits*, The Dallas

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[4]A national survey reported similar findings: "A full 78 percent [of those surveyed] believe that elected judges are influenced by having to raise campaign funds." National Center for State Courts, How The Public Views The State Courts, A 1999 National Survey at 3 (May 1999). *See also* Supreme Court of Minn., 1999-2000 Public Opinion of the Courts Study, Executive Summary at 5 (68% of respondents think elected judges are influenced by having to raise campaign funds) (available at www.courts.state.mn.us).

Morning News, Mar. 2, 1995, at 29A. Indeed, Justice Phillips has repeatedly acknowledged that the existing system compromises the appearance of fairness. *See, e.g.*, Hon. Thomas Phillips, State of the Judiciary, Address to the 77th Legislature (Feb. 13, 2001) ("The current system . . . has long outlived its usefulness, and now dangerously impedes public respect for the administration of justice.") (available at www.supreme.courts. state.tx.us/Docs/state2001.htm); *Study faults justices for business ties*, The Dallas Morning News, Feb. 24, 1998 (quoting Justice Phillips as saying "I do think the system lends itself to eroding public confidence."); *see also 2 more enter race for high court, Hopefuls say public lacks confidence in justices*, Dallas Morning News, Dec. 3, 1993, at 30A (reporting statement by Judge Jimmy Carroll (then chief justice of Third Circuit Court of Appeals) that "the current system of judicial campaign finance has led to the appearance of impropriety . . . on the Texas Supreme Court.").

Judges outside the state also recognize the improper appearance created when judges accept and solicit contributions from lawyers and parties appearing before them. *See Stretton v. Disciplinary Bd.*, 944 F.2d 137, 145 (3d Cir. 1991) ("There is no aspect of the electoral system of choosing judges that has drawn more vehement and justifiable criticism than the raising of campaign funds, particularly from lawyers and litigants likely to appear before the court"); *In re Mason*, 916 F.2d 384, 387 (7th Cir. 1990) (noting "difficult case" presented if attorney gave significant financial support to judge's campaign committee while judge presided over case in which attorney was involved).

Lawyers also believe that contributions influence decision-making. A 1999 survey prepared by the Supreme Court of Texas, in conjunction with the Texas State Bar and the

Texas Office of Court Administration, showed that 79 percent of Texas lawyers think the influence is "significant." The Courts and The Legal Profession in Texas, *supra*, at 54. Only one percent think that contributions do not affect decisionmaking at all. *Id.*

Similarly, newspapers throughout Texas recognize the appearance of impropriety caused by the current system of judicial elections. *See, e.g., Camera-Shy Justices Remember Lesson Learned in 1987*, Texas Lawyer, Aug. 24, 1998 ("In 1987, [then-Justice John] Hill told [*60 Minutes*' Mike] Wallace the problem was in how the court was perceived by the public. 'They look and see amounts of money that have been given by litigants. They wonder why. They get confused. They read stories. It breaks down confidence,' Hill said. Truer words were never spoken."); Editorial, *Is justice still for sale?*, Austin-American Statesman, June 25, 1998 ("danger of corruption and favoritism at all levels of the judiciary is obvious"); Editorial, *High court contributions show reforms are needed*, San Antonio Express-News, Mar. 1, 1998 ("Judges raising money from lawyers and other parties with an interest before the court raises an appearance of impropriety. Few would disagree."); Editorial, *Not for sale*, Texarkana Gazette, Feb. 26, 1998 ("At issue is the system, not the justices themselves. . . . It's time to . . . remove the 'for sale' sign from our Supreme Court.").

REASONS FOR GRANTING THE WRIT

I. The Right To Due Process Includes The Right To A Decisionmaker Who Both Is And Appears To Be Impartial.

Parties to civil cases have a constitutional right to a fair trial. *Latiolais v. Whitley*, 93 F.3d 205, 207 (5th Cir. 1996); *Lemons v. Skidmore*, 985 F.2d 354, 357 (7th Cir. 1993); *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93, 98 (3d Cir. 1988). And "[t]rial before an 'unbiased judge' is essential to due process." *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971); *accord Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 617 (1993) ("due process requires a 'neutral and detached judge in the first instance'") (citation omitted). As this Court has observed:

> The requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. *See Carey v. Piphus*, 435 U.S. 247 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172

> (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

Moreover, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). "[T]his stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Concrete Pipe & Prods.*, 508 U.S. at 618 (citing *Marshall v. Jerrico*, 446 U.S. at 243).[5] The Due Process Clause forbids even the "possible temptation to the average man as judge" not to be neutral and detached. *Id.* at 617 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)). Thus, in *Tumey v. Ohio*, 273 U.S. 510 (1927), this Court reversed a conviction in a case adjudicated by a town mayor who was paid for his service as a judge from fines he assessed when acting in a judicial capacity, although no showing of actual bias was made.

"[T]he [judge's] financial stake need not be as direct or positive as it appeared to be in *Tumey*." *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). For example, in *Ward v. Village of Monroeville*, the Court invalidated a scheme whereby a mayor

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[5] *Cf. United States v. Jordan*, 49 F.3d 152, 155 (5th Cir. 1995) (standard for recusal under 28 U.S.C. § 455(a) is whether "reasonable and objective person, knowing all of the facts, would harbor doubts concerning the judge's impartiality"; goal "is to avoid even the appearance of partiality") (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860-61 (1988)).

who was responsible for revenue production also adjudicated traffic and ordinance violations. The fines and other money derived from proceedings in the mayor's court accounted for a substantial portion of the village's revenues, although the mayor's salary was not directly affected by that money. 409 U.S. at 58-59. The Court concluded that a "possible temptation" exists "when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." *Id.* at 60; *see also Gibson v. Berryhill*, 411 U.S. at 579 (administrative board composed of optometrists could not preside over hearing against competing optometrists); *Marshall v. Jerrico*, 446 U.S. at 243 & n.2 (citing cases); *cf. Buckley v. Valeo*, 424 U.S. 1, 27 (1976) ("Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.").

Justice O'Connor has raised the question whether "the very practice of electing judges undermines" the interest in a judiciary that both is and appears to be impartial, and she has emphasized that the need to raise substantial funds to campaign for judicial office exacerbates this problem. *Republican Party of Minnesota v. White*, __ U.S. __, 122 S. Ct. 2528, 2542 (2002). "[R]elying on campaign donations may leave judges feeling indebted to certain parties or interest groups." *Id.* And "[e]ven if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary." *Id.* at 2543. Numerous surveys manifest the truth of those observations. *See id.* (citing surveys); *see also* studies cited *supra* p. 8 & n.4. In light of such facts, the principles articulated in this Court's opinions

compel the conclusion that the Texas system—and in particular the Texas courts' rulings that contributions never warrant recusal—engenders due process violations.

Petitioner's case exemplifies the constitutional risk of allowing interested parties to finance expensive judicial campaigns. Whether or not judicial decisions in Texas are in fact affected by a party's or lawyer's contribution to the judge's campaign, Ms. Walston can have no faith that the outcome of her case was not affected by the contributions to the judges who ruled against her. Indeed, the appearance of partiality in this case—where the judges ruled in favor of lawyers and a law firm that had made repeated contributions to them, and where the judges depend on campaign contributions to obtain and retain their jobs—is stronger and the connection between the money and the appearance more direct than in *Ward*.[6]

II. The States Are In Conflict Over The Standard To Be Applied Under The Due Process Clause When A Judge Presides Over A Case In Which He Or She Has Received Substantial Campaign Contributions From Interested Parties.

Texas courts have repeatedly rejected the argument that acceptance of campaign contributions from a party or its lawyer constitutes a due process violation or provides grounds for recusal. *See* cases cited *supra* p. 7. Other state high courts, however, have reached different conclusions. And although

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[6]The appearance of impropriety may be especially pernicious here, where the court of appeals ruled against Petitioner in an order that provided no reasons for the decision, thereby insulating the decision from objective public assessment and, as a practical matter, from further judicial review.

some of the cases base their holdings on state-law canons, rather than due process analysis, due process considerations, including the right to an impartial judicial decisionmaker, are at the heart of each decision.

For example, in sharp contrast with the Texas courts, the Oklahoma Supreme Court recognizes that "due process must include the right to a trial without the appearance of judge partiality arising from counsel's campaign contribution on behalf of a judge during a case pending before that judge." *Pierce v. Pierce*, 39 P.3d 791, 799 (Okla. 2001). Although in Oklahoma a "lawyer's contribution to a judge's campaign does not *per se* require that judge's disqualification when the lawyer comes before him," due process may require disqualification in an individual case. *Id.* at 798 (disqualification required when a lawyer made maximum campaign contribution allowed by statute, member of lawyer's immediate family contributed, and lawyer solicited contributions for judge's campaign). *Cf. In re Disqualification of Ney*, 657 N.E.2d 1367, 1368 (Ohio 1995) (disqualification involving campaign issues is "decided on a case-by-case basis").

The Florida Supreme Court has held that receipt of legal campaign contributions from parties or their lawyers does not itself require disqualification, although disqualification may be warranted if an additional factor is present, such as the party's lawyer serving as chair of the judge's campaign. *MacKenzie v. Super Kids Bargain Store*, 565 So.2d 1332, 1338 & n.5 (Fla. 1990) ($500 contribution to judicial campaign of judge's spouse does not warrant disqualification).

Similarly, in Washington, North Dakota, and West Virginia, "[a]lthough campaign contributions of which a judge has knowledge are not prohibited, these contributions may be

relevant to recusal" or disqualification. Wash. Code of Jud. Conduct, comment to Canon 7(b)(2); N.D. Code of Jud. Conduct, comment to Canon 5(C)(2); W. Va. Code of Jud. Conduct, comment to Canon 5(C)(2).

Nevada's practice is closer to that of Texas, although still not as absolute. On the one hand, the Nevada Supreme Court has held open the possibility that contributions could warrant disqualification: "In the context of campaign contributions . . . a contribution to a presiding judge by a party or an attorney does not *ordinarily* constitute grounds for disqualification." *City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial District Court*, 5 P.3d 1059 (Nev. 2000) (emphasis added, citation omitted). On the other hand, the Nevada court has held that disqualification was not only not required but *improper* when parties on one side of a case gave four donations to the presiding judge, ranging from $150 to $2,000. *Id.*; *see also* Nevada Code of Jud. Conduct, comment to Canon 3(e)(1) ("mere receipt of a campaign contribution from a witness, litigant, or lawyer involved with a proceeding is not grounds for disqualification").

In Alabama, recusal is required where judicial campaign contributions create an "appearance of impropriety." Ala. Stat. § 12-24-1. *See also* Ala. Stat. § 12-24-2(a), (b) (parties and lawyers required to submit disclosure certificates stating amount of contribution to assigned judge(s) within 28 days of notice of appeal or of notice of assignment of judge; recusal required on request of party if opposing party or opposing counsel (not aggregated) contributed more than $4,000 to supreme court justice or court of appeals judge or more than $2,000 to circuit court judge).

Thus, the states disagree on the extent to which campaign contributions from parties and lawyers on one side of a case implicate the due process rights of the opposing party, and only Texas takes the view that contributions can never create an unconstitutional appearance of impropriety, warranting disqualification. The Court should grant the petition to overturn Texas's refusal to consider campaign contributions as a basis for recusal and to provide guidance to the courts of the 31 states that elect some or all of their judges.

III. Petitioner Adequately Preserved The Question Presented.

Until she lost her case in the court of appeals, Petitioner had no cause to question the impartiality of the justices hearing her case. She learned for the first time that two of the three court of appeals justices who decided her case had accepted campaign contributions from the lawyers representing her adversary only *after* her petition for review before the Texas Supreme Court was denied. Pet. 3-4; Pet. App. 39. Therefore, she did not have an opportunity to move for recusal of the two court of appeals justices. After she learned the pertinent facts, Petitioner raised the issue in her motion for rehearing before the Texas Supreme Court. Although she did not use the words "due process," she expressly questioned the justices' partiality and doubted that she had received a fair hearing. Pet. App. 36 ("the judgment of the Tenth Court of Appeals may have been tainted by partiality on the part of the majority justices"); *id.* at 39 (contributions from individuals who profited from sale at issue in case and dissent by justice who did not receive contributions from interested parties contribute to "appearance that the judgment may be the result of improper consideration by the court.")

Throughout this litigation, Petitioner has acted *pro se*. Thus, although her presentation of the issue in the Texas Supreme Court could have been more artfully stated, her discussion is adequate to preserve the issue for this Court's review. As the Court has observed, "a *pro se* complaint 'however inartfully pleaded,' must be held 'to less stringent standards than formal pleadings drafted by lawyers' . . . ." *Hughes v. Rowe*, 449 U.S. 5, 10 n.7 (1980) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). Moreover, the need for leniency in considering *pro se* cases extends to preservation of issues. "In other words, a court of appeals may require less precision in the presentation of the issue to the lower court than it demands of a litigant represented by counsel." *Forshey v. Principi*, 284 F.3d 1335, 1357 (Fed. Cir. 2002). These considerations have particular force here, where, given the unwavering decisions of the Texas courts refusing to consider campaign contributions to judges as a basis for recusal, Petitioner's statement would have been summarily rejected under Texas law even if she had made it more clearly.

The "general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts . . . does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue." *Nelson v. Adams*, 529 U.S. 460, 469 (2000) (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174-75 (1988)). Petitioner's *pro se* papers satisfy this rule.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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